Hassan bin Datolah v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — SUIT NO S4–21–49 OF 1995
RAHMAH HUSSAIN J
14 JANUARY 2003

Tort *— Negligence — Professional negligence — Whether plaintiff had shown the causative link between the resultant damage or injury and the act of the doctor — Whether the doctor had exercised the requisite degree of skill and care as required of him by law — Whether the doctor had acted properly and adequately according to competent medical practice — The 'Bolam' test*

The plaintiff, while returning from the 'surau' (place of worship), missed a step. He did not fall but felt a slight pain at the back of his body. He did not seek any medical treatment immediately. He continued with his daily routine and went back to work. When the pain in his back became unbearable he went to seek medical treatment. There was no improvement in his condition. He was advised to seek further medical treatment from the General Hospital. He went to the General Hospital immediately. He was examined by Dr Yeow. After an x-ray was taken, Dr Yeow informed the plaintiff that he needed to undergo an operation. Dr Yeow also assured him of recovery after the operation. Otherwise, he would be paralyzed. The plaintiff consented to the operation, which was done. Subsequently, Dr Yeow did a second operation on the plaintiff. The plaintiff brought an action for negligence claiming that the operations had caused his paralysis.

Held, dismissing the plaintiff's case with costs:

(1) The activities engaged by the plaintiff prior to his admission to the hospital and the delay in seeking medical treatment had aggravated his injury. The plaintiff failed to show the causative link between the resultant damage or injury and the act of the doctor (see p 429G); *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909 followed.

(2) Dr Yeow had properly administered a caution and properly explained to the plaintiff the risk of the surgery. Dr Yeow had adequately obtained written consent from the plaintiff. The plaintiff too had never, at any time during the proceedings, brought forth any solid evidence to show that this was not done. Furthermore, the plaintiff had ample opportunity to pose any questions to Dr Yeow to clear any doubts that he might have had concerning the surgery he was to undergo. This was not done. From the totality of the evidence, Dr Yeow had exercised the requisite degree of skill and care as required of him by law. Dr Yeow had acted properly and adequately according to competent

medical practice (see pp 431A, D–E, I); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 followed. A

[Bahasa Malaysia summary

Plaintif, semasa kembali dari surau (tempat ibadat) telah tergelincir. Beliau tidak jatuh tetapi telah merasa sedikit sakit di bahagian belakang beliau. Beliau tidak mendapatkan rawatan perubatan dengan segera. Beliau terus dengan rutin harian dan telah kembali bekerja. Apabila bahagian belakang beliau menjadi sangat sakit, beliau telah mencari rawatan perubatan. Beliau tidak bertambah sihat. Beliau telah dinasihatkan supaya mendapatkan rawatan di Hospital Besar. Beliau telah pergi ke Hospital Besar dengan segera. Beliau telah diperiksa oleh Dr Yeow. Selepas x-ray diambil, Dr Yeow memberitahu plaintif bahawa plaintif perlu menjalani pembedahan. Dr Yeow juga meyakinkan plaintif bahawa beliau akan pulih selepas pembedahan itu. Jika tidak, beliau akan menjadi lumpuh. Plaintif memberi kebenaran untuk pembedahan itu, yang telah dijalankan. Selepas itu, Dr Yeow telah menjalankan pembedahan kedua ke atas plaintif. Plaintif telah memulakan satu tindakan untuk kecuaian and menuntut bahawa pembedahan-pembedahan itu telah menjadikan beliau lumpuh. B C D E

Diputuskan, menolak kes plaintif dengan kos:

(1) Aktiviti-aktiviti yang dijalankan oleh plaintif sebelum memasuki hospital dan kelewatan di dalam mendapatkan rawatan perubatan telah menjadikan kecederaan beliau semakin teruk. Plaintif telah gagal menunjukkan kaitan penyebab di antara kecederaan yang timbul sebagai akibat dan perbuatan doktor (lihat ms 429G); *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909 diikut. F

(2) Dr Yeow telah memberi amaran dengan betul dan telah menerangkan dengan betul risiko-risiko pembedahan itu. Dr Yeow telah mendapatkan keizinan bertulis daripada plaintif dengan cukup. Plaintif juga tidak pernah, pada bila-bila masa di dalam prosiding, mengemukakan sebarang keterangan yang kukuh untuk menunjukkan bahawa ini tidak pernah dibuat. Lagipun, plaintif mempunyai banyak peluang untuk bertanya kepada Dr Yeow untuk menyelesaikan keraguan beliau yang mungkin ada berkenaan pembedahan yang beliau perlu menjalani. Ini tidak dibuat. Daripada keseluruhan keterangan, Dr Yeow telah menggunakan tahap kemahiran dan berjaga-jaga yang diperlukan di sisi-sisi undang-undang. Dr Yeow telah bertindak dengan betul dan secukupnya menurut amalan perubatan kompeten (lihat ms 431A, D–E, I); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 diikut. G H I

Notes

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 798–849.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (folld)

Hotson v East Berkshire Area Health Authority [1987] 2 All ER 909 (folld)

Sidaway v Bethlem Royal Hospital Governors & Ors [1985] 1 All ER 643 (refd)

Kartar Singh (*Bachan & Kartar*) for the appellant.
Abdullah bin Hassan (Attorney-General's Chambers) for the respondent.

Rahmah Hussain J: The plaintiff's claims against the defendant are as follows:

(1) general damages;

(2) special damages;

(3) interest on general damages at 8%pa from the date of service of summons to the date of judgment or realization;

(4) interest on special damages at 4%pa from 8 May 1992 to the date of judgment and 8%pa from the date of judgment to the date of realization;

(5) costs of this action;

(6) further or other relief as this honorable court may deem fit and proper.

The brief facts of this case are: on the night of 30 April 1992 at about 8pm, while returning from the 'surau' (place of worship), the plaintiff missed a step. He did not fall but felt a slight pain at the back of his body. He did not seek any medical treatment that night. The following day was a public holiday being 'Labor Day'. He continued with his daily routine that is, by going to the surau and participating in the gotong-royong. Finally, on 2 May 1992, he went back to work. Then on 4 May, when the pain at his back became unbearable he went to Fauziah Clinic to seek medical treatment. There was no improvement in his condition, so he went to Sentosa Clinic to seek a second opinion. He was advised by the doctor there to seek further medical treatment from the General Hospital. He went to the General Hospital immediately, and reached there around midnight. At this time the pain had increased tremendously, so much so that he had difficulty in passing urine, as well. He was admitted straight away but was only attended to by a doctor the following day between 9am and 10am. On that particular day he was examined by Dr Yeow (SD1 or DW1). After an x-ray was taken, Dr Yeow informed the plaintiff that he needed to undergo an operation.

The doctor also assured him of recovery after the operation. Otherwise he would be paralyzed. So, the plaintiff consented to the operation, which was done on 7 May 1992. Subsequently, the doctor did a second operation on the plaintiff. According to DW1, the purpose of the second operation was to remove more bones, whilst in the first operation, it was only to relieve the compression at the L3/L4.

During the course of this trial, the plaintiff called two witnesses to prove his case. The first witness was PW2 (Azizah bte Mohd Zain) that is, the plaintiff's wife. The second witness was PW3 (Dr Tassim Rajan Mahamooth) who is a consultant orthopedic surgeon at Tawakal Hospital.

The defendant, on the other hand, called five witnesses, namely Dr Yeow Chai ('DW1'), the surgeon who had conducted the operation on the plaintiff; Dr Muhd Borhan Tan Abdullah ('DW2'), an orthopedic surgeon who was at the material time the head of the Orthopedic Services & Thermology Unit attached to the Kuala Lumpur General Hospital; Dr Shong Hing Kok ('DW3') who was a consultant orthopedic attached to Hospital Seremban; Mohamad Nor bin Ismail ('DW4') who was the assistant senior record officer for the Kuala Lumpur General Hospital and lastly Dr Sahabudin bin Raja Mohamed ('DW5') who was a Consultant Urologist attached to the Kuala Lumpur General Hospital.

In order to prove negligence on the part of the defendant and/or its servant or agent, the plaintiff had called, as his main witness PW3, Dr Tassim Rajan Mahamooth who testified that when he saw the plaintiff on 3 May 1993, the former was a paraplegic with severe agonizing pains down both calves. He said the plaintiff was numb from below the knees with no voluntary movement at the ankle. He added that the plaintiff's power at the hips was grade $^{4}/_{5}$; at the knees, grade $^{3}/_{4}$, while at ankle, 0. In other words, he said the plaintiff had sensory loss from the buttocks downwards with complete loss of power at the ankle (see exh P1 at pp137–139 of bundle B).

PW3 testified further that after carrying out tests on the plaintiff, he found that there was obstruction at the lumber region at L3/L4 and that there was a prolapse at L3/L4 and L4/L5. Thus from the entirety of his evidence, PW3 formed the opinion that the first operation done on 7 May 1992 at the General Hospital was fenestration with dissectomy at L3/L4 and the second operation on 26 May 1992 was laminectomy with the removal of part of the lamina. Thus, he was also of the opinion that the proper operation should have been by way of 'laminectomy', that is a wider decompression, instead of 'fenestration' which is only a narrow operation to relieve compression. Furthermore, he said if laminectomy had been done in the first operation, there was no necessity for the plaintiff to undergo the second operation.

As against PW3's evidence, the defendant called three doctors to testify on its behalf. The first was DW1, that is the doctor who carried out the two operations on the plaintiff. DW1 confirmed that on 7 May 1992, he did

A fenestration and removal of discs at L3/L4 by removing the covering at the back. He also confirmed that after the operation, the plaintiff neurologically deteriorated and his conditions worsened, that is the knee jerk was absent and power of ankle also decreased. So he carried out a second operation. He said before that he had explained to the plaintiff the risk of this operation (laminectomy), and that the plaintiff had given his consent. According to B DW1, this operation involved a wide exposure and decompression was done at two levels unlike the first operation which only received compression at L3/L4. Finally this witness agreed that if laminectomy had been done at L3/L4 instead of fenestration, there was no necessity for the second operation. However, he disagreed that both the operations had C caused the paralysis.

Thus from the evidence led by both parties, I was satisfied that the injury sustained by the plaintiff was a serious one which required immediate medical attention. The diagnosis carried out before the first operation was done confirmed that the plaintiff had Cauda Equina Compression D Syndrome or lesion. In fact, the plaintiff's main witness, PW3, also agreed that there was Cauda Equina Compression and that if it was not operated on the plaintiff would have been paralyzed. PW3 also testified that the myelogram indicated that PW1's injury was not a minor injury.

As to the plaintiff's delay in presenting himself for medical treatment, E DW2 had this to say:

> *I cannot attribute his current condition to surgeon error in the management he received at Hospital Kuala Lumpur. I am of the opinion that his current condition is the result of the pathology of Cauda Equina Compression which was presented late for treatment.* (Emphasis added).

F DW3 also confirmed DW2's evidence, when he said:

> *According to the teaching, the Cauda Equina Compression is worthwhile to operate early. In this case the operation on 7 May 1992 was done six days after the fall. This is considered to be a delay. The implication is that whatever damage has been done has been done.* (Emphasis added).

G At this juncture, I am convinced that the activities engaged by the plaintiff prior to his admission to the hospital and the delay in seeking medical treatment had aggravated his injury. In fact, even PW3 in his testimony was unsure whether or not the surgery caused the paralysis. As such, I am of the view that the plaintiff has failed to show to this court the causative link between the resultant damage or injury and the act of the doctor. In *Hotson* H *v East Berkshire Area Health Authority* [1987] 2 All ER 909, the House of Lords decided at p 910:

> Held — The crucial question of fact which the judge had had to determine was whether the cause of the plaintiff's injury was his fall or the health authority's negligence in making an incorrect diagnosis and delaying treatment, since if I the fall had caused the injury the negligence of the authority was irrelevant in regard to the plaintiff's disability. That question was to be decided on a balance of probabilities. Accordingly since the judge had held that on the

> balance of probabilities, given the plaintiff's condition when he first arrived at the hospital, even correct diagnosis and treatment would not have prevented the disability from occurring, it followed that the plaintiff had failed on the issue of causation and the issue of quantification considered by the judge therefore never arose, because questions concerning the loss of a chance could not arise where there had been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable.

Therefore, it is my considered opinion that the contention of learned counsel for the plaintiff that the injury was not serious and that the plaintiff's state of health had only deteriorated after the operation, cannot hold water.

The next issue to be determined is whether DW1 as the doctor who performed the first operation had exercised the degree of skill and care in opting to do the operation. According to DW1, after an x-ray was taken, he formed the opinion that the plaintiff had suffered a prolapse with Cauda Equina Compression. To confirm this he did a myelogram. After examining the result of the myelogram he believed that the patient needed an urgent operation to explore at Level L3/L4 only. This first operation was then carried out. After the operation was completed, the plaintiff neurologically deteriorated and his condition worsened. DW1 then decided that a second operation was needed. So, he carried out a procedure which was more or less the same as the first operation except that there was more exposure in this operation. He said during the first operation his aim was only to relief L3 and L4. However, he said the second operation was necessary, as the first operation did not achieve the desired result. The purpose of the second operation was to remove more bones.

To my mind, the main consideration now is whether the operation was done properly and appropriately according to the accepted medical practice. Both DW2 and DW3 in their testimonies had confirmed that the surgeries performed by DW1 was proper and accepted among them as surgeons. Moreover, both these witnesses strongly suggested that the two surgeries performed by DW1 did not cause the paralysis, hence there was no negligence on the part of DW1. Furthermore, the plaintiff's own witness, (PW3) also indicated that it was difficult to say whether the surgery did actually cause the paralysis. Thus from the evidence adduced by both parties, I feel that I can only come to one conclusion, that is that the evidence led by the plaintiff to support his claim has not been consistent and solid. In fact, the medical examination conducted by PW3 on 3 May 1993 was almost a year after the second operation which took place at the General Hospital on 26 May 1992. Therefore, to my mind, anything could have happened between these two periods that might aggravate the injury or interrupt the healing process. Finally, the treatment given or examination done by PW3 on the plaintiff was not done immediately to precisely ascertain any faults that might have occurred during the two surgeries conducted by DW1.

A Thus, I am satisfied that DW1 had acted properly and adequately according to competent medical practice. In the landmark case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, Mc Nair J in his judgment at p 128 had stressed this at great lengths as follows:

B > The question about which you have to make up your minds is whether Dr Allfrey, in following that practice, is doing something which no competent medical practitioner using due care would do, or whether, on the other hand, he is acting in accordance with a perfectly well recognized school of thought. Dr Marshall at Netherne Hospital adopts the same practice. Dr Baker at Banstead Hospital adopts the same practice. It is true, and in fact interesting as showing the diversity of practice, that Dr Page at the Three Counties Hospital, adopts a modification of that practice, inasmuch as he prefers to carry out the treatment in bed, with the patient controlled to some extent by the blanket, sheets and counterpane. That may be of interest to you as showing the diversity of practice; but it would not be right to take that as a condemnation of the practice adopted by the defendants.

C

D On the issue of whether DW1 had properly administered caution and properly explained to the plaintiff the risk of the surgery, I feel that DW1 had adequately obtained written consent from the plaintiff. The plaintiff too had never, at any time during the proceedings, brought forth any solid evidence to show that this was not done. Furthermore, the plaintiff had E ample opportunity to pose any questions to DW1 to clear any doubts that he might have concerning the surgery he was to undergo. Nevertheless, this was not done. Regarding patient obligation to ask, Lord Templeman in the case of *Sidaway v Bethlem Royal Hospital Governors and others* [1985] 1 All ER 643, at pp 664–665 had this to say:

F > In my opinion, if a patient knows that a major operation may entail serious consequences, the patient cannot complain of lack of information unless the patient asks in vain for more information or unless there is some danger which by its nature or magnitude or for some other reason requires to be separately taken into account by the patient in order to reach a balanced judgment in deciding whether or not to submit to the operation. To make Mr G Falconer liable for damages for negligence, in not expressly drawing Mrs Sidaway's attention to the risk of damage to the spinal cord and its consequences, Mrs Sidaway must show, and fails to show, that Mr Falconer was not entitled to assume, in the absence of questions from Mrs Sidaway, that his explanation of the nature of the operation was sufficient to alert Mrs Sidaway to the general danger of unavoidable and serious damage H inherent in the operation but sufficiently remote to justify the operation. There is no reason to think that Mr Falconer was aware that, as Mrs Sidaway deposed, a specific warning and assessment of the risk of spinal cord damage would have influenced Mrs Sidaway to decline the operation although the general explanation which she was given resulted in her consenting to the operation.

I Thus, from the totality of the evidence before me and applying the *Bolam* test, it is my considered opinion that Dr Yeow (DW1) had exercised the requisite degree of skill and care as is required of him by law. As such I am

satisfied that the plaintiff has not proven his case. Therefore it is dismissed with costs.

Plaintiff's case dismissed with costs.

Reported by Peter Ling